Supreme Court, U.S.
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No. 97-1868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT JOHN E. WARD

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STATEMENT OF THE CASE

1. Respondent John E. Ward is the former President and CEO of Management Analysis Company ("MAC"). (2a) MAC maintained under ERISA a long term disability plan for its employees, which it purchased from petitioner UNUM Life Ins. Co. Of America. *(Id.)* Ward resigned from MAC in May 1992. *(Id.)* At the time he resigned he was already suffering from diabetic neuropathy that caused him to experience severe and disabling leg pain. (3a)

2. The nature and extent of Ward's illness and resulting disability were diagnosed by December 1992, and in early 1993 Ward had applied for and received state disability benefits. (3a) Ward then contacted MAC's Human Resources department to arrange for a continuation of his insurance coverage under COBRA. (28a) MAC forwarded materials to Ward and explained that in order to extend his benefits it was necessary for him to obtain a disability determination from the Social Security Administration. *(Id.)* Ward obtained a Social Security award of disability and forwarded a copy to MAC. (*Id.*) No one from MAC ever informed Ward that he might obtain disability coverage under MAC's plan. (*Id.*)

3. Ward discovered a pamphlet discussing MAC's plan in April 1994, while cleaning out a safe-deposit box. (*Id.*) He then contacted MAC, who told him he was eligible and sent him an application for benefits. (29a) Ward completed the application and sent it to MAC, who forwarded it to petitioner on April 11, 1994. (*Id.*) Petitioner denied the claim as untimely two days later. (*Id.*) To have been timely UNUM would have had to have received the claim no later than November 5, 1993. (5a) Ward sought

reconsideration under ERISA and UNUM confirmed its decision to deny his claim. (*Id.*)

4. Ward filed suit in federal court under ERISA. (*Id.*) Petitioner moved for and obtained summary judgment against Ward on the ground that his claim was untimely under the plan. (4a)

5. Ward appealed and the Court of Appeals reversed, holding that its decision in *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939 (9th Cir. 1998)(petition for cert. filed in no. 97-1367) required reversal and a remand for application of the California notice-prejudice rule. (5a, 6a) The court instructed the district court to remand the case to the plan administrator to determine whether the plan had suffered prejudice because Ward's claim was late. (6a)

6. After determining to remand the judgment against Ward, the court undertook an alternative analysis of the case, based on Ward's argument that MAC was UNUM's agent, and therefore MAC's actual notice of his claim by March 1993 should operate as notice to UNUM. (7a) Ward's argument was based on *Elfstrom v. New York Life Ins. Co.*, 67 Cal.2d 503, 432 P.2d 731, 63 Cal. Rptr. 35 (1967), which held that an employer administering a group insurance policy was acting as the insurer's agent. (7a, 8a)

7. The court reviewed California decisions after *Elfstrom*, and similar decisions from other jurisdictions, and determined that the proper formulation of the "*Elfstrom* rule" was articulated by the Oregon Supreme Court in *Paulson v. Western Life Ins. Co.*, 636 P.2d 935 (Or. 1981) (12a, 13a n.6) Per *Paulson*, if the insurer exclusively administered the policy the employer is not its agent as a matter of law; if the employer exclusively administered the policy it is the insurer's agent as a matter of law; and if the function of

policy administration is divided agency becomes a question of fact. 636 P.2d at 939. (13a)

8. Petitioner argued that MAC was not its agent as a matter of law because its policy contains a term to that effect (14a) Petitioner claimed that the court was obligated to apply this language no matter what its actual relationship with MAC might have been because ERISA requires courts to adhere to an "absolute and literal" interpretation of the plan documents. (13a) The court disagreed, noting that the law in the Ninth Circuit, and in other circuits was to interpret plans "reasonably," not "literally." (13a n.7) The court found instead that the existence of an agency relationship was a question of fact, and was not controlled by how the policy characterized it. (14a, 15a)

9. Finding no precedent within the Ninth Circuit that addressed the relationship between ERISA and state-law agency principles, the court looked to other circuits, finding persuasive the Fifth Circuit's decision in *Turrill v. Life Ins. Co. Of North America*, 753 F.2d 1322 (5th Cir. 1985). *Turill* reversed a summary judgment against the beneficiary of an ERISA disability plan granted on the ground that his claim was untimely. The *Turrill* court found that an employer's administration of the plan under ERISA could raise an issue of agency under state law, so that notice of the claim to the employer constituted notice to the plan. 753 F.2d at 1324. (17a, 18a)

10. The court below determined that MAC's duties as plan administrator included determining whether employees were eligible for coverage, enrolling them in the plan, issuing certificates of insurance, advising employees on the scope of benefits available, collecting and forwarding premiums to the insurer, and, on at least one occasion helping an employee file a claim for benefits. (19a) In addition, the

court noted that plan documents advised beneficiaries to contact MAC if they had any questions about the plan. (19a) Based on these facts, the court determined that under *Turrill* and *Elfstrom* there was a question of fact under California law regarding the existence of an agency relationship between MAC and UNUM. (20a)

11. The court next considered whether ERISA pre-empted the *Elfstrom* rule in light of this Court's recent decisions in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *Cal. Div. Of Labor Enforcement v. Dillingham Construction Co.*, 117 S.Ct. 832 (1997). (20a) The court determined that ERISA did not pre-empt the *Elfstrom* rule, because it did not dictate the benefits to be provided, the manner in which the plan will be administered, or create an agency relationship that did not already exist as a consequence of the parties' course of dealing. (22a-24a) The court found that plan participants and beneficiaries should be permitted to rely on MAC's appearance as UNUM's agent in administering the plan, absent some communication from UNUM to plan members that UNUM had disavowed "the sufficiency of the employer's performance of its functions under the plan." (23a)

12. The court held that whether MAC acted as UNUM's agent could not be determined on the record before it as a matter of law. (24a, 25a) The court explained that the issue became material only in the event that the issue of the timeliness of Ward's notice under the notice-prejudice rule was resolved adversely to him. (25a) In that event, the court instructed the district court to determine whether MAC functioned as UNUM's agent in administering the plan, "and if so, whether Ward furnished timely notice and proof of his

disability to MAC, and if so, to what remedies Ward may be entitled." (25a)

REASONS FOR DENYING THE WRIT

I. The Reasons For Denying Review Based On the Application of California's Notice-Prejudice Rule Are Stated In The Brief In Opposition to the Petition Filed In *Cisneros v. UNUM*

The Court of Appeals decided this case based on its decision in *Cisneros v. UNUM*. (6a) UNUM's petition in that case is currently pending.[1] To the extent that UNUM seeks review of the decision below because it applies the notice-prejudice rule (Pet. at 9-16), the reasons for denying the writ are stated in Cisneros's brief in opposition to UNUM's petition at pages 5 through 13. Ward's remaining arguments for why the petition should be denied pertain to the second question presented in the petition.

II. The Petition Seeks Review of a Contingent Alternative Holding in an Interlocutory Case, Which Is Unlikely to Have Any Role in The Ultimate Disposition of The Case

The Court of Appeals did not discuss the potential application of the *Elfstrom* rule until after it held that the judgment would be reversed and remanded for application of the notice-prejudice rule under *Cisneros*. (6a) The court did not apply the *Elfstrom* rule; it remanded the case to the district court with instructions to remand to the plan

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[1] No. 97-1867, filed May 20, 1998.

administrator to apply the notice-prejudice rule. (25a) The district court was to consider whether the *Elfstrom* rule applies to the case *only if* the plan administrator determines that petitioner had suffered actual prejudice as a result of Ward's late claim. (25a)

While this Court has jurisdiction to review an interlocutory decision of the Court of Appeals under 28 U.S.C. § 1254(1), it is Ward's understanding that it is ordinarily not the Court's practice to do so unless "there is an important and clear-cut issue of law that is fundamental to the further conduct of the case." *Randolf Central School District v. Aldrich*, 506 U.S. 965 (1992)(White, J., dissenting from denial of certiorari) [citations omitted]. This is not such a case.

Petitioner's strong opposition to the application of the notice-prejudice rule is presumably premised on the difficulty it imposes on insurers to show that they suffered any actual prejudice because the claim was filed late. In this case petitioner attempted to persuade the Court of Appeals that it had been prejudiced, but the court noted that petitioner had offered little, if any, evidence to support its claim. (7a n.4) While the issue remains open for further consideration below, the court plainly felt that it was unlikely that petitioner would be able to prove that an investigation that could have been undertaken in November 1993 (the plan deadline for Ward's claim) was not possible by April 1994 (the actual filing date). (*Id.*)

Because the Court of Appeals made application of the *Elfstrom* rule a contingent alternative holding, it cannot be said that its application is fundamental to the further conduct of the case. This case is therefore a poor vehicle for review.

III. The Application of State-Law Agency Principles To ERISA Plans Has Not Been At The Forefront Of ERISA Litigation — Only Two Circuits Have Considered It

Issues of ERISA pre-emption have made their way to this Court's docket 16 times,[2] and have been the subject of thousands of decisions in the lower courts.[3] Yet, despite the frequency with which ERISA pre-emption cases occur, only two circuit court decisions have considered whether, under state-law agency principles, notice to a plan administrator can operate as notice to the plan. Those cases are the case below and the Fifth Circuit's decision in *Turrill*. Nor have the district courts had to address the issue. The court below located only one pertinent decision from a district court.[4] (23a n.13)

In its petition, UNUM argues that the Ninth Circuit's decision conflicts with virtually every other circuit in some way, but never identifies a single decision that deals with the application of agency principles to ERISA plans. Petitioner therefore comes to this Court seeking review of an issue that has only twice reached a circuit court and which was decided

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[2] *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 117 U.S. at 842-843 n.1 and n.2 (1997)(Scalia, J., concurring).

[3] *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 135, and n.3 (Stevens, J., dissenting) (observing that in 1992, a LEXIS search uncovered more than 2,800 opinions on ERISA pre-emption).

[4] *Kennedy v. System One Holdings, Inc.*, 835 F. Supp. 947 (S.D.Tex. 1993), was called to the court's attention by petitioner.

consistently in both cases. There would appear to be no compelling need for this Court to intervene.

IV. The Petition Is Based on a Literal Interpretation of the Words "Relate To" in § 514(a) of ERISA, an Approach This Court Abandoned in 1995; The Decision of the Court Below Is Fully Consistent With this Court's Current ERISA Pre-emption Cases

The petition relies on the outmoded approach to ERISA pre-emption foreclosed by *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. at 645. In *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 117 U.S. 1747, 1751 (1997), the Second Circuit relied on the same improper approach to reinstate its original judgment after this Court had vacated its earlier judgment and remanded for further consideration in light of *Travelers*. In reversing, this Court explained that the lower court had erroneously adhered to its previous "expansive and literal interpretation of the words 'relate to' in § 514(a) of ERISA," which "fail[ed] to give proper weight to *Travelers*' rejection of a strictly literal reading of § 514(a)." 117 U.S. at 1751. Not surprisingly, the petition does not cite *DeBuono*.

Here, the petition does cite *Travelers*, but does not discuss or recognize the limitations that case placed on the pre-emptive scope of § 514(a). *Travelers* held that the "relates to" language in § 514(a) was not intended to modify "the starting presumption that Congress does not intend to supplant state law." 514 U.S. at 654. Under *Travelers* and *DeBuono* state laws of general application that operate in areas traditionally subject to local regulation will not be

found to "relate to" an ERISA plan even if they impose some indirect economic cost on the plan or its administration. *Travelers*, 514 U.S. at 668; *DeBuono*, 117 U.S. at 1752. These laws are not pre-empted because their connection to ERISA plans is simply too tenuous, remote or peripheral to the plan. *Shaw v. Delta Air Lines*, 463 U.S. 85, 100, n.21 (1983).

In *DeBuono*, the Court held that New York's tax on hospitals did not relate to an ERISA plan, even though some plans owned hospitals and were taxed directly. The Court explained that the tax did not intrude on ERISA plans in a way Congress had forbidden, stating:

> "This is not a case in which New York has forbidden a method of calculating pension benefits that federal law permits, or required employers to provide certain benefits. Nor is it a case in which the existence of a pension plan is a critical element of a state cause of action, or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans." 117 S.Ct. at 1752. [footnotes omitted].

These observations are all applicable here. In applying the *Elfstrom* rule the court below merely held that where an employer was, in fact, functioning as the agent for the plan insurer, state-law agency principles would dictate that notice to the agent constituted notice to the principal. This application to an ERISA plan of a state-law principle of general application is fully consistent with this Court's approach to ERISA pre-emption.

The Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988), demonstrates that § 514(a) is not a barrier to the application of the *Elfstrom*

rule. *Mackey* held that application of a general state garnishment statute to permit garnishment of plan participants' benefits did not "relate to" the plan, even though application of the statute imposed direct administrative costs and burdens on the plan. 486 U.S. at 831.

The Court's conclusion rested on two premises. First, ERISA expressly permits a plan to "sue and be sued" as an entity, and it is commonplace for plans to be sued for "run-of-the-mill state-law claims" by creditors or even tort victims. *Id.* at 833. Second, since ERISA does not contain an enforcement mechanism for judgments against a plan, state-law methods of collecting money judgments must apply to ERISA plans. *Id.* at 833-834. The Court concluded that ERISA therefore does not pre-empt state-law methods for enforcing judgments against ERISA plans, including garnishment. *Id.* at 834.

The significance of the Court's analysis in *Mackey* for this case is its rejection of the argument that § 514(a) should be construed to permit the use of state-law methods to enforce judgments against ERISA plans, *except* when the mechanism affects whether benefits will be paid to a plan participant. 486 U.S. at 835. The Court held that this interpretation of § 514(a) was untenable because a garnishment law that did not "relate to" an ERISA plan when invoked by a plan creditor could not "relate to" the plan when invoked by a plan beneficiary. *Id.* at 836.

The Ninth Circuit's decision below is fully consistent with this analysis. Even petitioner does not suggest here that the state-law agency principles applied in *Elfstrom* would not apply in the type of "run-of-the-mill" state-law lawsuits described in *Mackey*. If those principles are available to plan creditors or tort victims, *Mackey* teaches that they do not become pre-empted when invoked by plan beneficiaries.

Petitioner makes much of the fact that the plan states that the employer is not its agent, and the *Elfstrom* rule, if applied, would be inconsistent with this statement. (*See, e.g.*, Pet. at 11-14). This is a variant of petitioner's argument below that ERISA required courts to follow an "absolute and literal" interpretation of all plan language. (13a-14a) The court properly rejected this claim, noting that courts were required to interpret a plan "reasonably," not "literally." (14a n.7)[5]

The court below found that petitioner's conduct was sufficient to raise as a question of fact (should it become necessary to determine whether to apply the *Elfstrom* rule) whether petitioner had relied on the employer to function as its agent. (20a) If the *Elfstrom* rule is ever applied, it would merely "describe in legal terms a relationship that already existed in fact." (22a)

ERISA itself recognizes that the test for whether a person is a "fiduciary" under the statute rests on the actual duties the person performs, and not their title. § 3(21)(A)(i), 29 U.S.C. § 1102(21)(A)(i). *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (person becomes fiduciary under ERISA by fulfilling certain defined functions). Nothing in ERISA or the decisions of this Court suggests that where a party's conduct actually conflicts with some provision in the plan purporting to describe the party's role, a court must choose form over substance. *Leigh v. Engle*, 727 F.2d 113, 141 n.33 (7th Cir. 1984)("we think ERISA directs

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[5] For this point the court relied upon *Saffle v. Sierra Pacific Power Co. Long Term Disability Income Plan*, 85 F.3d 455, 458 (9th Cir. 1996)(plan defining disability as inability to perform "each and every" job duty could not be construed literally); *Helms v. Monsanto Co., Inc.*, 728 F.2d 1416 (11th Cir.1984)(same); and *Torix v. Ball Corp.*, 862 F.2d 1428 (10th Cir.1988) (same).

courts to look beyond Engle and Libco's formal authority . . . and to consider what real authority they had . . . ."); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992)(court looks beyond plan formalities to determine if defendant, in fact, exercised the authority of a fiduciary).[6]

The decision below therefore does not conflict with the cases cited by petitioner that recognize that a court may not re-write an ERISA plan. (Pet. at 14) None of the cases petitioner cites involve an inconsistency between the actual relationship between the plan insurer and the plan administrator, and the description of that relationship in the plan.[7]

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[6] In a related context, several circuits have held or suggested that the party performing the duties of a plan administrator may be held liable for failing to administer the plan in accordance with ERISA's dictates, even if the plan designates another party as the plan administrator. *See, e.g., Law v. Ernst & Young*, 956 F.2d 364, 373 (1st Cir. 1992)(holding de facto administrator can be held liable); *Rosen v. TRW, Inc.*, 979 F.2d 191, 193-194 (11th Cir. 1992)(same), *Fischer v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990)(noting that argument has "intuitive appeal," but finding no need to reach it because there was no violation of ERISA), *Jones v. UOP*, 16 F.3d 141, 144 (7th Cir. 1994)(court "could imagine" case in which plan sponsor could be estopped to deny that it was the administrator, but this is not that case), but *see, McKinsey v. Sentry Ins.*, 986 F.2d 401, 404 (10th Cir. 1993)(ERISA does not recognize a de facto administrator, but permitting actions of putative de facto administrator to be imputed to designated administrator); *Crocco v. Xerox Corp.*, 137 F.3d 105, 107 (2d Cir. 1998)(ERISA does not recognize de facto administrator). The instant case does not raise the issue of whether a de facto administrator can exist, or whether it can be held liable for statutory penalties under § 502(c)(1).

[7] Petitioner's lengthy string cite at p. 14 of the petition cites two cases for the self-evident proposition that courts may not re-write ERISA, and eight cases stating that courts must not re-write ERISA plans. Each

V. The Decision Below Does Not Create a Split in The Circuits

To the extent that petitioner claims the decision below creates a split in the circuits its argument is predominantly directed to the application of the notice-prejudice rule, and is addressed in the brief in opposition filed in *Cisneros*. With respect to the potential application of the *Elfstrom* rule, as explained above, petitioner cannot cite any case, other than the Fifth Circuit's decision in *Turrill*, which considers whether agency principles permit notice given to the administrator to be imputed to the plan.

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is inapposite here. *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992), held that plaintiff could not assert a claim under ERISA for oral representations of coverage. In *Hunt v. Hawthorne Assoc. Inc.*, 119 F.3d 888 (11th Cir. 1997), the court held that a retired Eastern Airlines pilot could not circumvent a plan amendment that discontinued lump-sum distributions. *Edwards v. Great-West Life Assurance Co.*, 20 F.3d 748, 750 (7th Cir. 1994), enforced a term in the plan that required an employee to be "actively at work" on the day he first became eligible for benefits. Similarly, *Burnham v. The Guardian Life Insurance Company of America*, 873 F.2d 486, 490 (1st Cir. 1989), held that an employee who was bed-ridden with cancer at the time of his death was not a "full-time employee" as the plan defined that term. In *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d at 56-57, the Fourth Circuit held that a plan beneficiary could not recover benefits where the plan insurer terminated her coverage because her employer had failed to pay premiums. *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1004 (6th Cir. 1993), held that an employer's verbal assurances that former employees would continue to receive benefits was not enforceable if it conflicted with the terms of the plan. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1296 (5th Cir. 1989), held that oral assurances that a beneficiary's retirement benefits would be the same under one plan option as under another could not be enforced.

Petitioner claims that the decision below conflicts with *Jass v. Prudential Health Care Plans, Inc.*, 88 F.3d 1482 (7th Cir. 1996). There is no conflict. In *Jass*, the gravamen of the plaintiff's claims was that her health plan improperly denied her benefits for post-surgical rehabilitation and as a result her doctor failed to provide her with adequate treatment. 88 F.3d at 1485. She attempted to sue the plan, the plan employee who made the benefits determination, and the doctor. Her claims against the plan included a claim for vicarious liability based on the negligence of the employee and the doctor. *Id.*

After unraveling several jurisdictional knots the *Jass* court concluded that plaintiff's claims were, in essence, a single claim under ERISA for the denial of plan benefits, and remanded to permit her to proceed on that basis. 88 F.3d at 1494.

Here, unlike Ms. Jass, Ward does not seek to hold petitioner liable for damages on a vicarious liability theory based on a wrong committed by its agent. He does not seek to hold petitioner vicariously liable at all; rather, should it become necessary, he only seeks to impute MAC's notice of his claim to UNUM on an agency theory so that he can recover benefits due under the plan.

VI. The Decision Below Does Not Conflict with Pilot Life

Point IV of the petition suggests that the decision below conflicts with ERISA's civil enforcement provisions and therefore attempts to circumvent *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). (Pet. at 22-25) There is no conflict. *Pilot Life* held that Mississippi's law of bad faith was pre-empted by ERISA for two reasons: (1) it "related to"

an ERISA plan, but was not within the scope of the savings clause, and (2) it created a remedy that was outside of the civil enforcement provision of ERISA, § 502(a). As shown above, the *Elfstrom* rule does not refer to ERISA plans, and its connection with them is too tenuous and remote to fall within ERISA's pre-emptive scope under § 514(a).

Nor would application of the *Elfstrom* rule create a remedy outside of the scope of those contained in § 502(a). In *Pilot Life* the plaintiff asserted a claim for damages based on the plan's failure to process his claim for benefits properly, not a claim for plan benefits. Here, all Ward seeks are plan benefits, a remedy expressly granted by § 502(a)(1)(B). He does not seek an extra-contractual remedy, and therefore does not seek to circumvent *Pilot Life*.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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